APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 98-2490

Jayson Sepe,
Appellant,
v.
McDonnell Douglas Corporation,
Appellee.

Appeal from the United States District Court
for the Eastern District of Missouri.

Submitted: January 15, 1999
Filed: June 7, 1999

Before RICHARD S. ARNOLD and WOLLMAN,[1] Circuit Judges, and TUNHEIM,[2] District Judge.

WOLLMAN, Chief Judge.

Jayson Sepe appeals the district court's[3] adverse grant of summary judgment on his claim under the Family and Medical Leave Act (FMLA), 29 U.S.C. §§ 2601-2654, against his former employer, McDonnell Douglas Corporation. We affirm.

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[1]Roger L. Wollman became Chief Judge of the United States Court of Appeals for the Eighth Circuit on April 24, 1999.

[2]The Honorable John R. Tunheim, United States District Judge for the District of Minnesota, sitting by designation.

[3]The Honorable Donald J. Stohr, United States District Judge for the Eastern District of Missouri.

I.

Sepe was hired by McDonnell Douglas in 1984 as a sheet metal riveter and was later promoted to the position of builder. Both positions were union positions, and Sepe was a member of the International Association of Machinists and Aerospace Workers, District Lodge 837. Sepe was continuously employed by McDonnell Douglas until his termination in August, 1995, except for a one year period in 1991, when he was temporarily laid off as a result of a reduction in force.

During his lay-off in 1991, Sepe and his wife started an excavating business call J&K Excavating and Bobcat Services (J&K). Sepe's wife was the president of the business and handled the day-to day affairs. Sepe assisted her when he was not working at McDonnell Douglas.

McDonnell Douglas did not prohibit its employees from working a second job, and Sepe's supervisors knew of his work at J&K. McDonnell Douglas did, however, prohibit its employees from working on another job while on leave from the company. McDonnell Douglas's general operating procedures state:

> Employees accepting other employment or engaging in self-employment while on authorized leave of absence will be terminated by the Company unless written authorization has been granted by the Manager-Employee Records prior to commencement of the [leave of absence].

Appellee's Appx. at 21. In addition, the collective bargaining agreement (CBA), which applies to all union employees, prohibit Sepe from engaging in other employment while on leave from McDonnell Douglas. Specifically, Article VII, Section 7 of the CBA provides:

> An employee accepting other employment or engaged in business for himself while on leave of absence shall be

> discharged by the Company unless the Union and the Company have jointly, prior to the commencement of such leave of absence, agreed in writing that it could be done.

Appellee's Appx. at 17-18.

In May 1995, Sepe requested and was granted a twelve-week leave of absence from McDonnell Douglas in connection with the birth of his daughter. Sepe had taken medical leave from June 14, 1994, to December 19, 1994, and from March 13, 1995, to March 27, 1995. As a result, Sepe had worked only 822 hours during the previous twelve months.

McDonnell Douglas officials received notice in May 1995 that Sepe was working at J&K while on leave. A McDonnell Douglas investigation team subsequently videotaped Sepe working at J&K during his normally scheduled hours at McDonnell Douglas. When Sepe returned to work in August 1995, he was terminated for violating the terms and conditions of the CBA.

Sepe filed this action against McDonnell Douglas, alleging a violation of his rights under the FMLA. The district court found that Sepe was not an "eligible" employee for purposes of the FMLA because he had not worked the minimum number of hours required by the statute. The district court also found that Sepe was fired for violating the terms of the CBA and not in retaliation for exercising his rights under the FMLA.

II.

We will affirm a grant of summary judgment if the evidence, viewed in the light most favorable to the nonmoving party, establishes that no genuine question of material fact exists and that the moving party is entitled to judgment as a matter of law. *See Montandon v. Farmland Indus., Inc.*, 116 F. 3d 355, 357 (8th Cir. 1997); *Bashara v. Black Hills Corp.*, 26 F. 3d, 820, 823 (8th Cir. 1994); *see also* Fed. R. Civ. P. 56.

The FMLA grants eligible employees up to twelve weeks of leave during any twelve-month period for enumerated circumstances, including "the birth of a son or daughter of the employee." 29 U.S.C. § 2612 (a)(1)(A). *See Moore v. Payless Shoe Source, Inc.*, 139 F.3d 1210, 1213 (8th Cir. 1998) (discussing the FMLA). An eligible employee is one who has been employed "for at least 12 months by the employer" and provided "at least 1250 hours of service during the previous 12-month period." 29 U.S.C. §2611 (2)(A)(i)-(ii). Because Sepe worked only 822 hours during the year preceding his request for leave, he does not qualify as an "eligible employee" and therefore is not entitled to FMLA protection.

Despite Sepe's ineligibility under the statute, he argues that McDonnell Douglas is estopped from challenging his eligibility by operation of 29 C.F.R. § 825.110(d), which states:

> If an employee notifies the employer of need for FMLA leave before the employee meets these eligibility criteria, the employer must either confirm the employee's eligibility based upon a projection that the employee will be eligible on the date leave would commence or must advise the employee when the eligibility requirement is met. If the employer confirms eligibility at the time the notice for leave is received, the employer may not subsequently challenge the employee's eligibility.

29 C.F.R. § 825.110(d). Sepe argues that McDonnell Douglas is estopped from challenging his eligibility because it approved his request for leave and subsequently failed to notify him of his ineligibility under the FMLA.

We need not grapple with the question whether the regulation in question grants rights greater than those conferred by the FMLA, for we agree with the district court that Sepe was fired because he had violated the terms of the CBA and not in retaliation for having exercised any rights under the FMLA.

Sepe does not dispute that he engaged in "other employment" by working at J&K while on leave. Thus, McDonnell Douglas was within its rights - - indeed, was required to under the terms of the CBA - - to fire Sepe after he engaged in such employment without written permission to do so.

The judgment is affirmed.

A true copy,

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 98-2490EMSL

Jayson Sepe,
Appellant,
v.
McDonnell Douglas Corporation,
Appellee.

Appeal from the United States District Court
for the Eastern District of Missouri.

The petition for rehearing filed by the appellant has been considered by the court and is denied.

(5193-010199)

July 12, 1999

Order Entered at the Direction of the Court:
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Court

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 4:97CV470-DJS

Jayson Sepe,
Plaintiff,
v.
McDonnell Douglas Corporation,
Defendant.

ORDER

On March 18, 1997, plaintiff filed the instant complaint against defendant, his former employer. Plaintiff alleges that defendant terminated his employment in violation of the Family and Medical Leave Act of 1993 ("FMLA"), 29 U.S.C. §2601, *et seq.* This matter is now before the Court on defendant's motion for a summary judgment.

I. Undisputed Facts

Plaintiff commenced his employment with defendant on April 17, 1984 as a sheet metal assembly riveter, and was later promoted to the position of builder, mock up and tooling. Both jobs are union positions and plaintiff was a member of the International Association of Machinists and Aerospace Workers, District Lodge 837. Plaintiff has been continuously employed by defendant since 1984 except while laid off for approximately one year beginning in 1991. Plaintiff's wife, Karen Sepe, started a business called J&K Excavating and Bobcat Services (hereinafter "J&K") during plaintiff's lay off. Both plaintiff and his wife were obligated on a $10,000 note, the

proceeds of which were used to start the business. While working for defendant, plaintiff assisted his wife in the operation of the business.

In May of 1995, plaintiff requested and took a twelve-week leave of absence in connection with the birth of his daughter. In the year preceding the requested leave, plaintiff had taken medical leave from June 14, 1994 to December 19, 1994 and from March 13, 1995 to March 27, 1995. Accordingly, plaintiff had only worked 822 hours in the year preceding his leave of absence for the birth of his daughter.

Plaintiff's union's collective bargaining agreement ("CBA") with defendant provides in relevant part:

> An employee accepting other employment or engaged in business for himself while on leave of absence shall be discharged by the Company unless the Union and the Company have jointly, prior to the commencement of such leave of absence, agreed in writing that it could be done...

Deft's Mtn. for Summary Judgment, Exh. B, Collective Bargaining Agreement, Art. VII, §7. Moreover, defendant's General Operating Procedure provides:

> Employees accepting other employment or engaging in self-employment while on authorized leave of absence are terminated by the Company unless written authorization has been granted by the Manager of Employee Records prior to commencement of the LOA.

Id., Exh. C, General Operating Procedures, 3, ¶3. Plaintiff admits that he worked for J&K during all three of his aforementioned leave periods. During plaintiff's March 1995 leave, one of plaintiff's supervisors, Ted Moody, was informed that plaintiff was working during his leave. Because that leave period was only two weeks in duration, there was inadequate time for defendant's security department to act on Moody's request for

investigation of this allegation. Later, during plaintiff's twelve-week leave period, Moody requested an investigation. Surveillance conducted by the security department revealed that plaintiff had been operating excavating equipment during his normally scheduled work hours. Moreover, plaintiff admitted that he worked for J&K during the leave period. Plaintiff contends that he did equal amounts of parenting and assisting his wife with J&K during his twelve-week leave. Defendant terminated plaintiff's employment on August 8, 1995, citing plaintiff's violation of Article VII, Section 7 of the CBA.

II. Summary Judgment Standard

This Court must grant summary judgment if, based upon the pleadings, admissions, depositions, and affidavits, there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P.56 (c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). The moving party must initially demonstrate the absence of an issue for trial. *Id.* at 323. Any doubt as to the existence of a material fact must be resolved in favor of the party opposing the motion. "The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

Nevertheless, once a motion is properly made and supported, the nonmoving party may not rest upon the allegations in its pleadings but must instead set forth specific facts showing that there is a genuine issue of material fact for trial. Fed. R. Civ. P. 56 (e). Summary judgment must be granted to the movant if, after adequate time for discovery, the nonmoving party fails to produce any proof to establish an element essential to the party's case and upon which it bears the burden of proof at trial. *Celotex Corp.*, 477 U.S. at 322-24. For "a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Id.* at 323. A

party opposing summary judgment cannot resist a properly made motion by reference only to its pleadings. *Id.* at 324, 325. "Rule 56 (e) permits a proper summary judgment motion to be opposed by any of the kinds of evidentiary materials listed in Rule 56 (c), except the mere pleadings themselves." *Id.* at 324.

III. Discussion

The FMLA allows eligible employees up to twelve weeks of leave during any twelve month period for enumerated reasons including "the birth of a son or daughter of the employee and in order to care for such son or daughter." 29 U.S.C. § 2612 (a)(1)(A). "To be eligible, the employee must have at least 1250 'hours of service' during the twelve months prior to commencement of leave." *Moore v. Payless Shoe Source, Inc.,* 1998 WL138851, at *3 (8th Cir. March 30, 1998), *citing 29* U.S.C. § 2611 (2)(A).

In the instant action , there is a dispute as to whether plaintiff is an "eligible employee" for purposes of the FMLA. Defendant argues that because plaintiff did not work 1250 hours in the twelve months preceding the requested leave, he is not protected under the FMLA, even though he did qualify for leave under defendant's policy. In opposition, plaintiff argues that defendant should be estopped from arguing that he is not an "eligible employee" because defendant granted his request for leave which specifically mentioned the FMLA. A Department of Labor regulation provides:

> If an employee notifies the employer of need for FMLA leave before the employee meets these eligibility criteria, the employer must either confirm the employee's eligibility based upon a projection that the employee will be eligible on the date leave would commence or must advise the employee when the eligibility requirement is met. If the employer confirms eligibility at the time the notice for

> leave is received, the employer may not subsequently challenge the employee's eligibility.

29 C.F.R. § 825.110(d). At least two courts have found this regulation to be invalid because it is contrary to the clear language in the FMLA setting forth requirements for employee eligibility. *See Seaman v. Downtown Partnership of Baltimore, Inc.*, No. CCB-97-3193, 1998 WL 30237 at *7 (D. Maryland Jan. 20, 1998), *citing Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984); *see also Wolke v. Dreadnought Marine, Inc.* 954 F. Supp. 1133, 1137 (E.D. Va. 1997). However, the *Wolke* court did not foreclose the possibility that an employer could be estopped from contesting an employee's eligibility under the statute where the employee had detrimentally relied on an erroneous belief that he or she was eligible. *Wolke*, 954 F. Supp. at 1137. Plaintiff has cited the *Wolke* case to support his estoppel claim. The Court finds that plaintiff has failed to demonstrate any detrimental reliance which would support a finding of estoppel in this case. Plaintiff received the leave that he requested, even though he was not eligible under the FMLA. Plaintiff's claims of retaliatory discharge do not support a finding of detrimental reliance on his eligibility under the Act. Accordingly, the Court finds plaintiff's estoppel argument to be without merit, and because plaintiff worked only 822 hours in the twelve-month period preceding his leave, he was not an eligible employee for purposes of the FMLA. *See* 29 U.S.C. § 2611 (2)(A).

In the alternative, the Court will address plaintiff's claim as though he were an eligible employee under the FMLA. There are differing views as to what constitutes a prima facie case for purposes of the FMLA. Many courts have applied for the burden-shifting analytical framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973). See, e.g., Richmond v. Oneok, Inc., 120 F. 3d 205, 208, (10th Cir. 1997); Morgan v. Hilti, Inc., 108 F. 3d 1319, 1322 (10th Cir. 1997).

However, In *Diaz v. Fort Wayne Foundry Corp.*, 131 F. 3d 711, 712-13 (7th Cir. 1997), the Seventh Circuit Court of Appeals recently held that substantive claims under the FMLA are not properly analyzed under the *McDonnell Douglas* framework. The *Diaz* court applied a direct analysis of whether the employee in question was wrongfully denied benefits guaranteed by the statute. *Id.* at 713. The *Diaz* court noted:

> At least one court of appeals has used a derivative burden-shifting approach for claims based on the anti-retaliation provision of the FMLA . . . and we reserve judgment on this possibility. (It is not clear what a burden-shifting approach could add, but at least it would not misdirect attention, as it does for substantive claims.)

Id. The Court finds that defendant is entitled to judgment as a matter of law under either the direct approach applied in *Diaz* or under the *McDonnell Douglas* burden-shifting analysis.

Several courts have identified the prima facie case for a claim of FMLA retaliation as requiring plaintiff to show: (1) he engaged in activity protected under the FMLA; (2) he subsequently suffered adverse action by the employer; and (3) a causal connection existed between the employee's activity and the adverse action. *See Richmond*, 120 F. 3d at 208; *Hillman v. Hamilton College*, 1998 WL 166827, at *6 (N.D.N.Y. April 9, 1998). Defendant argues that plaintiff has failed to establish a prima facie case for retaliation. First, defendant contends that because plaintiff does not qualify as an eligible employee for purposes of the Act, that he did not engage in protected activity. As discussed above, the Court finds that plaintiff was not an eligible employee. Therefore, plaintiff did not engage in protected activity under the FMLA, and thus plaintiff fails to properly assert a prima facie case. In the alternative, even if the Court were to find that plaintiff had engaged in protected activity under the FMLA, his claim fails on the causal connection

element.

Defendant argues that plaintiff cannot establish the requisite causal connection between his protected activity and the adverse employment action. "An employee who contends that he was terminated because he took FMLA leave must show his termination was motivated by discrimination based on that leave." *Marks v. School Dist. of Kansas City*, 941 F. Supp. 886, 892, (W.D. Mo. 1996), *quoting Day v. Excel Corp.*, 1996 WL 29341, at *13 (D. Kan. May 17, 1996). Defendant argues that plaintiff was terminated for violating Article VII, Section 7 of the CBA which prohibits employees from accepting other employment or engaging in business for themselves while on leave of absence and not for taking leave under the FMLA. In response, plaintiff argues that "the FMLA was the vehicle used by defendant to entrap Sepe" and therefore, the causal connection between his termination and his leave has been established. *See* Pltf's Mem. in Opp., 7. Plaintiff has failed to show that his termination was motivated by discrimination based on his FMLA leave. Defendant fired plaintiff for violating the CBA and the General Operating Procedures of the company, not for taking leave because of the birth of his daughter. As stated in the FMLA, leave is authorized "[b]ecause of the birth of a son or daughter . . . and in order to care for such son or daughter." 29 U.S.C. § 2612 (a)(1)(A). Leave is not authorized for the purpose of operating a family member's business. Accordingly, the Court concludes that plaintiff has failed to establish a prima facie case for retaliatory discharge under the FMLA.

> After establishment of a prima facie case, the burden shifts to the employer to offer a legitimate nondiscriminatory reason for its employment decision. If the employer comes forward with a nondiscriminatory reason for its actions, the burden then reverts to the plaintiff to show that there is a genuine dispute of material fact as to whether the employer's proffered reason for the challenged action is pretextual - -

> i.e., unworthy of belief. Demonstrating pretext gets plaintiff over the hurdle of summary judgment.

Morgan, 108 F. 3d at 1323 (internal citations omitted).

Defendant has satisfied any subsequent burden of producing evidence that plaintiff's termination was for a legitimate, non-discriminatory reason. Consequently, even if plaintiff were to satisfy the causal connection requirement of the prima facie case in this context, the ultimate burden is also his to prove that defendant's proffered non-discriminatory reason is a pretext for discrimination.

In the instant case, defendant has advanced a legitimate non-discriminatory reason for terminating plaintiff. As previously discussed, defendant argues that it did not terminate plaintiff for taking leave pursuant to the FMLA, on the contrary, defendant had permitted plaintiff to take several other periods of leave. Defendant's reason for terminating plaintiff was the violation of a clear provision of the CBA and the GOP of the company. Plaintiff has failed to demonstrate that defendant's proffered reason for termination is pretextual.

> Pretext can be shown by such weaknesses, implausibilities, inconsistencies, incoherences, or contradictions in the employer's proferred legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence . . .

Id. Plaintiff attempts to establish pretext by arguing that a genuine issue of material fact exists as to whether plaintiff violated the collective bargaining agreement. Plaintiff contends that a fact issue exists as to whether plaintiff was "engaged in business for himself" because his wife, Karen Sepe, was the sole

proprietor of the business.[1] Moreover, plaintiff asserts that Article VII, Section 7 of the CBA is ambiguous and to the extent that it does not allow an employee on leave to engage in other employment while employees not on leave are permitted to do so, the CBA violates the FMLA. The issue before the Court is not the proper interpretation of the CBA, the question is whether defendant violated the FMLA when it terminated plaintiff's employment. Plaintiff admitted to engaging in other employment during his usual work hours while he was on FMLA leave. This conduct constitutes a violation of the CBA and company policy and resulted in plaintiff's termination. The reason for his termination did not violate plaintiff's right to care for his daughter during his leave, and therefore did not violate the purpose of the FMLA. In light of the foregoing, defendant is entitled to summary judgment on plaintiff's claims under the FMLA.

The same rationale applies to the analysis espoused in *Diaz*. The inquiry becomes whether plaintiff has established that he is entitled to the benefit he claims under the FMLA. *Diaz*, 131 F. 3d at 713; see also *Hubbard v. Blue Cross Blue Shield*, 1998 WL 171831, at *7 (N.D. Ill. April 10, 1998). The benefit plaintiff claims to have been denied is the right not to be terminated from employment for requesting and taking leave under the FMLA. It is unlawful to discharge or discriminate against an employee for exercising his rights under the FMLA. 29 U.S.C. § 2615. The Court concludes that defendant has demonstrated that plaintiff was not terminated for exercising his rights under the FMLA, but instead was terminated for working in other employment during his leave period in violation of the CBA and company policy. Therefore, defendant is entitled to judgment as a matter of law.

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[1]Plaintiff does not address the fact that the CBA bars accepting other employment as well as engaging in self-employment while on leave and that his work for J&K could readily be viewed as accepting other employment.

In light of the foregoing, defendant is entitled to summary judgment under either the *Diaz* approach or the *McDonnell Douglas* analysis.

Accordingly,

IT IS HEREBY ORDERED that defendant's motion for summary judgment [Doc. #26] is granted.

/s/ illegible
illegible
UNITED STATES

DISTRICT JUDGE

Dated this 29th day of April, 1998.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 4:97CV470-DJS

Jayson Sepe,
Plaintiff,
v.
McDonnell Douglas Corporation,
Defendants.

JUDGMENT

Pursuant to the order entered herein,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that summary judgment is entered in favor of defendant and against plaintiff on all claims asserted in plaintiff's complaint.

/s/ illegible
illegible
UNITED STATES
DISTRICT JUDGE

Dated this 29th day of April, 1998.

The determinations of whether an employee has worked for the employer for at least 1,250 hours in the past 12 months and has been employed by the employer for a total of at least 12 months must be made as of the date the leave commences. If an employee notifies the employer of need for FMLA leave before the employee meets these eligibility criteria, the employer must either confirm the employee's eligibility based upon a projection that the employee will be eligible on the date leave would commence or must advise the employee when the eligibility requirement is met. If the employer confirms eligibility at the time the notice for leave is received, the employer may not subsequently challenge the employee's eligibility. In the latter case, if the employer does not advise the employee whether the employee is eligible as soon as practicable (*i.e.*, two business days absent extenuating circumstances) after the date employee eligibility is determined, the employee will have satisfied the notice requirements and the notice of leave is considered current and outstanding until the employer does advise. If the employer fails to advise the employee whether the employee is eligible prior to the date the requested leave is to commence, the employee will be deemed eligible. The employer may not, then, deny the leave. Where the employee does not give notice of the need for leave more than two business days prior to commencing leave, the employee will be deemed to be eligible if the employer fails to advise the employee that the employee is not eligible within two business days of receiving the employee's notice.